SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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1. As the district court noted, this case raises "novel questions" (JA 19) as to the application of the copyright statute to the operation of community antenna television systems (CATV). These questions, which the district court called the "basic issue of copyright infringement" (JA 25) were separated under Federal Rule 42 from the other issues in the pleadings on Respondent's motion. R. 3853-3923. In support of its motion, Respondent urged that the separate determination of the "vital" Copyright and Communications Act question was urgent since if this "decisive" issue of "important national interest" was not separated and determined, Respondent and other copyright owners

"will be forced to bring a multiplicity of law suits throughout the United States." R. 3888, 3891, 4158, 4166, 4169.

Without denying the importance of the case, Respondent (Respondent's Brief in Opposition, pp. 4-5, hereinafter cited "Res. Br.") now implies that the decision on the basic copyright-communications law issue is somehow not ripe for determination by this Court and should await a trial on the other separated issues.[1] This implication flies in the face of Respondent's statement, consenting to Petitioner's appeal under § 1292(b), that "The reason for Plaintiff's desire to facilitate an appellate review of the issues decided by the District Court herein is the vital importance of the basic copyright issue in this case to the motion picture, television and CATV industries."

Unless reviewed by this Court, the decision below on the basic Copyright and Communications Act questions will constitute for practical purposes the controlling resolution of the issue. Certainly, it will establish the rule governing the suits to be filed in the Second Circuit. Also, Respondent has sent briefs to municipalities throughout the country advising that they are liable as contributory infringers if they franchise CATV systems in their municipalities. R. 5268 et seq. A decision by this Court will remove doubts as to municipalities' actions on CATV franchises.

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[1] Respondent quotes (Res. Br. 5, n. 4) out of context from Petitioner's opposition to the motion for separation of the issues as implying that the decision below is not final as to the "basic copyright issue". Petitioner opposed the motion to separate primarily on the ground that it was premature: Petitioner's discovery had only started, while Respondent's discovery was complete. R. 4186 et seq.

The Register of Copyrights, in testimony on the general copyright bill, recognized both the importance and novelty of the issue presented to the Court in this case.[2] In this testimony, the Register stated that the issue presented represents a major issue on which the present law is unsettled. He termed the question one of "national importance" that is "inextricably bound up with policy questions in the communications field."[3]

2. In ruling on the "basic copyright issue", the court below proclaimed a new doctrine of contributory infringement. A CATV system was held to have publicly performed because of the "magnitude of its *contribution* to the viewing of broadcast television programs by its subscribers". Pet. 11a. (Emphasis supplied.) Respondent concedes that the *viewing* by the subscribers does not constitute infringement. Res. Br. 25. If "the result brought about by one of defendant's CATV systems" (Pet 7a) is concededly non-infringing, it is impossible to see how Petitioner can be liable because it "contributed" to bring about that result.

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[2] Hearings pursuant to S. Res. 201 on S. 1006 before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., at 10 (1966).

[3] *Id.*, at 10. Respondent quotes (Res. Br. 29) from earlier testimony of the Register of Copyrights who originally favored a "similar conclusion" (JA 106) to that of the court below: that CATV systems should be considered performers. Subsequently, in his testimony on general copyright revision before the Senate Copyright Subcommittee, he said that in his earlier testimony quoted by Respondent, he was "*not expressing any opinion as to what the present law on the subject is*, and that the problems facing CATV operators in obtaining clearances are real ones that cannot be brushed aside". *Id.*, at 6. (Emphasis supplied.) In his Senate testimony, he favored a bill which would provide non-liability for CATV reception within the normal service area of the stations whose signals are received. *Id.*, at 6-9.

Respondent abandons the contributory concept of performance announced by the court below. Respondent distinguishes between *viewing* by a subscriber, which it concedes is non-infringing, and its theory of *performance* by a community antenna system, which is independent of the "viewing". Res. Br. 25.[4] Respondent's theory is that the community antenna systems are liable for infringement, not because they contribute to the "viewing" by subscribers as the court below held, but because the systems receive and "transmit" or "retransmit" the broadcast signals.[5] Respondent argues as though "transmit" and "perform" were synonymous and as though "transmit" appeared in the statute. Transmission is the process of transferring an electrical signal from one location to another and has no necessary relevance to performance.[6] Transmission may have copyright significance if the person transmitting, for example, a broadcaster, has first made a

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[4] Thus, a homeowner is not restricted in any way in the antenna he wants to erect for reception, and his reception and viewing of the programs would not infringe (Res. Br. 38). In Respondent's view, however, the homeowner is compelled to "do it yourself" and is not free to enlist the services of persons in the position of Petitioner to assist them. Compare *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 495, 498-500 (1964); see Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1529 (1967).

[5] "Petitioner's retransmission of a broadcast to its thousands of subscribers is itself a performance . . . ." (Res. Br. 12) See also, e.g., Res. Br. 12, 13, 18, 21, 22, 23, 25.

[6] In the district court, the Respondent conceded that "No contention has been made that plaintiff, or for that matter anyone else, owns a copyright in the electromagnetic waves broadcast by the television stations and retransmitted by defendant's CATV systems." Supplemental Memorandum on Copyright Law (R. 5457 et seq., at 5459).

performance which by transmission he makes public. The performance is separate from the transmission.

The cases relied upon by Respondent provide no support for the transmission theory. Res. Br. 17-25. In the *Remick* case[7] and the *Messager* case[8] the performance was not in the "transmission" but was live in the studio. The critical question was whether the live performance in the studio had been made "public" by being broadcast.[9]

Respondent's theory of "performance" based merely on the fact of "transmission" of electromagnetic energy would encompass common apartment house master antenna systems, communications common carriers and indeed every television and radio set. Respondent's expert made it clear that transmission is involved every time a wire or cable is utilized to transfer electromag-

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[7] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir. 1925), *cert. denied*, 269 U.S. 556 (1925).

[8] *Messager* v. *British Broadcasting Co.* [1927] 2 K.B. 543, *rev'd on other grounds*, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151.

[9] Respondent mistakenly relies (Res. Br. 16) on *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911) in support of a theory that the Copyright Act will always cover new technological developments. *Kalem* focused on the meaning of the statutory words and held that a motion picture based on a book infringed the right "to dramatize" the work, since drama can be achieved by action as well as word. The rule on "after developed" methods was stated in the *Remick* case, *supra*, where the court said (p. 411):

> "In other words, the statute may be applied to new situations not anticipated by Congress, *if, fairly construed, such situations come within its intent and meaning.*" (Emphasis supplied.)

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908), in construing the word "copy", shows that the proper principle of statutory construction is to determine the "ordinary sense" or "common understanding" of the word, at 16, 17.

netic energy from one location to another. JA 554. Thus, an apartment house master antenna and even a home antenna receive and transmit the signal from the antenna to the set, just as a CATV does. JA 641-643.

If the mere act of "transmission" constitutes the performance, then every apartment master antenna system is engaged in a public performance although the program is unseen and unheard and, as in the case of Petitioner's CATV system, incapable of being seen or heard within the system. Communications common carriers provide inter-city and intra-city television transmission service to television networks and stations. It is inconceivable that the "ordinary sense" or "common understanding" [10] of "performance" in the Copyright Act encompass a sweeping doctrine under which communications common carriers perform a copyrighted work because they provide transmission service and, therefore, the copyright owner can collect an additional royalty from them.[11]

The error in Respondent's position lies in Respondent's confusion of "performance" with "transmission" and its distortion of the meaning of "performance"

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[10] *White-Smith, supra,* n.9 at 16, 17.

[11] The public utility statutes of Connecticut classify CATV systems as public service companies subject to the jurisdiction of the Public Utilities Commission in the same manner as telephone companies. Conn. Gen. Stat. Rev. §§ 16-1, 16-330, 16-331. If telephone utilities (communications common carriers) providing television transmission service for broadcast stations are not making a performance, then CATV systems in Connecticut are likewise not performing. In fact, of course, CATV in states other than Connecticut is engaged in private carriage of signals for subscribers who pay the fee and is no more a performer, because of "transmission", than a telephone company.

beyond the "ordinary" and "common sense" meaning of the word as contemplated by the Copyright Act.

As was recently stated by Professor Benjamin Kaplan:

> "In a deeper view the copyright question is seen as but one phase of the problem of the place of CATV systems in national communications . . . . Instead of conjuring with 'transmission', we have to consider whether clamping down copyright controls would have any hurtful anticompetitive effects, or would be consistent with the declared purposes of the Federal Communications Act, or would serve as a desirable means of correcting the hardships which CATV systems may visit on TV stations in the same localities." B. Kaplan, *An Unhurried View of Copyright,* 105-06 (1967) (printed earlier in 66 Colum. L. Rev. 831, 844 (1966)).

3. Respondent would write the Communications Act off the books so far as the right of the public to receive licensed broadcasts is concerned, and would turn the public's access to broadcasts solely on copyright law. Res. Br. 34-39. Respondent would collect one royalty from the broadcasting station, and another from the public for its use of a CATV system (or an apartment house master antenna because of transmission) to receive a broadcast. Respondent's argument runs roughshod over the Act's definition of broadcasting as "the dissemination of radio communications intended to be received by the public . . . ." 47 U.S.C. 153(o) (1964). This provision, as has been recently noted, "means that the homeowner has the right to receive any material which is broadcast over the public airways." Note, *CATV and Copyright Liability,* 80 Harv. L. Rev. 1514, 1520 (1967).

In furtherance of its authority to establish "areas or zones" to be served by television stations (47 U.S.C. 303(h) (1964)), the Commission adopted the CATV rules set out in the *Second Report and Order*.[12] In a subsequent general reconsideration of those rules, the Commission described the rules as requiring a CATV system to "carry the signal of a station which puts a Grade B or better contour over any part of the community" subject to priorities in the regulations.[13] Explaining that the regulations on carriage further its "responsibility to prescribe the areas to be served by television broadcast stations (Section 303(h))," [14] the Commission went on to say (id., para. 32):[15]

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[12] *Second Report and Order, Community Antenna Television Systems*, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966).

[13] *Memorandum Opinion and Order*, 6 F.C.C. 2d 309, para. 11 (1967).

[14] *Id.*, para. 12.

[15] The criticism of the B contour carriage rule, which Respondent repeats, that reception under actual conditions may vary from the "B" contour rule of thumb (Res. Br. 40-41) was rejected by the Commission (*id.*, para. 12 n.6):

> "However, examination of the question of actual signal strength in the community or actual contours is necessarily minute and often futile, as it is very difficult to make a valid showing through measurements over a sufficiently wide area and a long enough period of time. Moreover, where a community comes within the predicted Grade B contour of a station, the station's signal is normally readily available for reception by the sophisticated CATV equipment, utilizing as they do choice receiving sites."

The "radio horizon" referred to by Respondent (Res. Br. 21) is no measure of a station's service area. Because broadcast television signals follow the contour of the earth by a process known as "bending", reception beyond the radio horizon is normal; the B Contour of a television station is beyond the radio horizon. (JA 1162-1164, 1170, 1177-1178)

> "We regard this [B] contour as generally delineating the area within which service from the station can reasonably be expected. The carriage requirements as an allocation principle are geared to the Grade B contour in order that the station may have access to all persons within this general service area."

The Commission undertook in its regulations "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States." [16] There is no justification for fashioning under the copyright law a limitation on the public's right of access to broadcasts in a station's service area as designated by the Commission.

At the very least, the court below offended the policies of the Copyright Act and the Communications Act when it imposed infringement liability on Petitioner with respect to one-half the situations in which Petitioner's CATV systems are located within the B Contour of the stations. Pet. 15-16. Since CATV operation within the B Contour of the station is common, involving millions of viewers, this aspect of the decision alone is, Petitioners submits, sufficient reason for granting the writ.

4. The Federal Communications Commission has moved to deal with any danger to the public interest and to copyright owners by reason of CATV existence and activity. Its rules were designed to deal with the competitive impact of CATV systems on broadcasting stations, and the other problems referred to by Respondent (Res. Br. 46-49). The Commission concluded that "they represent a fair balancing of the competing

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[16] *Second Report and Order*, para. 47.

interests, and properly accommodate both industries and thus, the public interest . . . ." [17]

The validity of the Commission's regulation of CATV is now before the Court. *United States* v. *Southwestern Cable Co., cert. granted,* 36 U.S.L.W. 3171 (U.S. Oct. 23, 1967) (No. 363). Determination of the *Southwestern* case will not dispose of the issues presented here as to the application of copyright to the operations of a community antenna system. The *Southwestern* case and the present case are complementary and together present the major public issues relating to CATV. Review of this case with the *Southwestern* case will enable the Court to consider what Professor Benjamin Kaplan called "the problem of the place of CATV systems in national communications" by dealing simultaneously with the interrelated policies of the Communications Act and the Copyright Act.

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[17] *Id.*, para. 109.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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